UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA,	)	
	)	
v.	)	Case No. 2:18-cr-00030-1
	)	
KOREY STEWART,	)	
	)	
Defendant.	)	

OPINION AND ORDER
DENYING DEFENDANT'S MOTION TO SUPPRESS
(Doc. 202)

Defendant Korey Stewart moves to suppress all evidence obtained as a result of a September 22, 2016 traffic stop on the grounds that the New Hampshire State Trooper who conducted the traffic stop lacked reasonable suspicion for it. (Doc. 202.) The government opposes the motion.

On July 23, 2019, the court held an evidentiary hearing at which Drug Enforcement Agency ("DEA") Special Agent Mark Persson ("SA Persson"), DEA Special Agent, former New Hampshire State Trooper, Andrew Frigon ("SA Frigon"), and Defendant testified. On August 6, 2019, the parties filed supplemental briefing at which time the court took the pending motion under advisement.

Defendant is represented by Kevin M. Henry, Esq. and Avi J. Springer, Esq. The government is represented by Assistant United States Attorneys Jonathan Ophardt and Spencer Willig.

I. Findings of Fact.

On September 22, 2016, DEA agents were surveilling potential drug trafficking activity through the use of a cell phone search warrant which allowed them to receive location data for cell phone number (917) 780-9282 (the "Target Phone"). The DEA agents believed the Target Phone was being used by a drug trafficking organization to communicate among alleged co-conspirators. That morning, the Target Phone was

tracked from Portland, Maine to Vermont and appeared to be traveling in a late model red Dodge Durango with Massachusetts license plates.

The DEA surveillance team determined that the red Durango stopped briefly at a multi-unit apartment building on Morehouse Drive which is a dead-end street in Colchester, Vermont. Eric Ross, a suspected drug trafficker, was known to live in one of the buildings and was a known associate of Defendant although only one phone call had been recorded between the Target Phone and Mr. Ross. The DEA agents did not determine whether the occupants of the red Durango entered one of the multi-unit buildings because of a concern that their surveillance would be detected. SA Persson credibly testified that the short duration of the stop in the vicinity of Mr. Ross's apartment was consistent with a pickup or drop off of narcotics or drug proceeds. As the red Durango left Colchester, Vermont, members of the DEA surveillance team followed it southbound on Interstate 89. When the red Durango crossed into New Hampshire, SA Persson alerted the New Hampshire State Police of the vehicle's whereabouts. He further advised that the DEA agents' surveillance of the red Durango was part of an ongoing drug trafficking investigation. SA Persson noted that the red Durango had stopped for a short duration in the vicinity of a known drug associate's residence before traveling into New Hampshire and advised that the DEA was conducting both electronic and mobile surveillance of the vehicle. SA Persson requested that the red Durango be stopped.

On the day in question, SA Frigon was on patrol as a New Hampshire State Trooper and was advised by his supervisor that the DEA had requested that the red Durango be stopped. At the time, SA Frigon had a pending employment application before the DEA. He was asked to conduct a "walled off" traffic stop of the red Durango whereby he did not disclose the DEA's involvement in the stop. SA Frigon testified that SA Persson informed him that a 2015 red Dodge Durango with Massachusetts license plates had been identified as being associated with narcotics trafficking and was part of an ongoing DEA investigation. SA Persson further communicated that there were multiple occupants in the vehicle, one who was known to have multiple aliases. SA Frigon was also advised that the red Durango had traveled to Vermont earlier that day

and that the DEA had been conducting electronic and mobile surveillance of the Target Phone and the vehicle.

As SA Frigon followed the red Durango in his cruiser, he noted that it exceeded the posted speed limit, traveling approximately seventy-five miles per hour on an interstate with a posted speed limit of sixty-five miles per hour. Defendant credibly testified that he was attempting to stay within the posted speed limits because he had a parole violation. SA Frigon further observed the red Durango travel into the breakdown lane until it encountered a disabled vehicle in that lane, at which time the red Durango abruptly shifted back into the travel lane. SA Frigon effected a traffic stop thereafter. SA Frigon described the basis for his stop as follows:

> I observed a red SUV traveling within lane #1, to drift to the right, across the solid, white, highly visible line separating travel lane #1 from the emergency breakdown lane with approximately 1/2 of the vehicle violating RSA 265:22 Highway Markings. The vehicle proceeded to travel southbound within the emergency breakdown lane at a high rate of speed of which I visually estimated to be approximately 75mph. This vehicle was rapidly approaching the rear of the pickup truck within the emergency breakdown lane, which remained with its emergency hazard lights activated. Only moments before striking the rear of this pickup truck, the red SUV violently swerved the vehicle to the left, causing a visible dip on the right side of the vehicle toward the pavement. The vehicle continued to travel into travel lane #1, and further left traveling with 1/4 of the vehicle into travel lane #2 before straightening the path of the vehicle back out, and assuming a pattern of travel within travel lane #1.

(Doc. 202-2 at 8.)

Defendant was the operator of the red Durango at the time of the traffic stop. He admitted to SA Frigon that he was glancing down at his GPS before he noticed the disabled vehicle in the emergency breakdown lane. SA Frigon observed that Defendant appeared to have a GPS navigation application open on a smartphone in his lap at the time of the stop. In response to a request for identification, Defendant provided the name of Keith Clayton Young, Jr. and a driver's license with that fictitious name from the State of Florida. SA Frigon informed Defendant that he had been stopped for violating N.H. Rev. Stat. § 265:22.

Defendant's passenger, Nicole Osborne, shut the cover of her laptop as soon as SA Frigon approached on the passenger side of the vehicle. In her grand jury testimony, she acknowledged that she and Defendant were "just basically following GPS directions[,]" (Exh. C at 22) and that they had stopped at an apartment complex in the general Burlington, Vermont area for approximately ten minutes. Although she claimed Defendant "definitely wasn't speeding[,]" *id.* at 29, or driving erratically, she admitted that she was working on her laptop prior to the traffic stop.

SA Frigon advised the occupants of the red Durango that he smelled the odor of marijuana. When Ms. Osborne opened the glove box of the red Durango to search for the vehicle's registration, he observed rolling papers which he recognized as a type used for marijuana cigarettes. He inquired about the smell of burnt marijuana and Ms. Osbourne admitted that she had been smoking marijuana in the vehicle prior to the stop. According to her grand jury testimony, Ms. Osbourne stated she had a medical marijuana card for autism which she claimed to have shown to him. She admitted that she was not honest with SA Frigon about her path of travel because she "felt like the whole stop was kind of bogus" and because she was "enraged with him." *Id.* at 31.

SA Frigon's partner on duty that day, Trooper Haden Wilber of the New Hampshire State Police ("Trooper Wilber"), assisted with the traffic stop. He arrived after SA Frigon effected the stop and assisted in interviewing Defendant. With Defendant's consent, Trooper Wilber performed a search of Defendant's person which yielded $4,030 in United States currency that was seized as suspected drug proceeds. Trooper Wilber also noted that Defendant had two cell phones. After Ms. Osborne declined to consent to a search of the red Durango, Trooper Wilber used his canine unit to conduct an exterior sniff of the vehicle. The canine unit alerted to the presence of narcotics and SA Frigon and Trooper Wilber seized the vehicle for purposes of applying for a search warrant.

Thereafter, SA Frigon applied for and obtained a state court search warrant for the red Durango based on a nine page, single spaced affidavit asserting he believed there was probable cause to search the vehicle for controlled substances, as well as drug

paraphernalia, cash proceeds related to the trafficking of illegal controlled substances, or books, records, and receipts related to illegal drug trafficking. SA Frigon's search warrant affidavit set forth Defendant's and Ms. Osborne's inconsistent stories regarding the path and purpose of their travel, noted that Trooper Wilber had recovered approximately $4,000 in cash from Defendant's person, and included Ms. Osborne's admissions regarding smoking marijuana as well as the canine unit's alert to the presence of narcotics in the vehicle. According to SA Frigon, Ms. Osborne did not produce a medical marijuana card, could not identity her qualifying medical condition, and claimed her medical marijuana card was in the vehicle. She stated she had a nineteen-year-old child at home with autism to whom she needed to return. In his search warrant application and affidavit, SA Frigon did not disclose the DEA's involvement in the traffic stop.

II. Conclusions of Law and Analysis.

A. Whether the Traffic Stop Violated the Fourth Amendment.

Defendant moves to suppress all evidence obtained as a result of the September 22, 2016 traffic stop on the grounds that he was stopped in violation of the Fourth Amendment. The government counters that the stop was constitutional based on two independent grounds. First, the government argues Defendant violated New Hampshire traffic laws by his excessive speed and by crossing into the emergency breakdown lane. Second, it contends the New Hampshire State Trooper who stopped the vehicle had a reasonable suspicion that the red Durango was involved in illegal drug trafficking activity based on the collective knowledge doctrine.

The Fourth Amendment guarantees the right of the people "against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "Under *Terry* [*v. Ohio*], a police officer may briefly detain an individual for questioning if the officer has a reasonable suspicion that the individual is, has been, or is about to be engaged in criminal activity." *United States v. Padilla*, 548 F.3d 179, 186 (2d Cir. 2008) (internal quotation marks omitted). A *Terry* stop "must be 'justified at its inception.'" *United States v. Freeman*, 735 F.3d 92, 96 (2d Cir. 2013) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). "[T]he

amount of suspicion needed to justify [a *Terry* stop] is less than a 'fair probability' of wrongdoing, and 'considerably less than proof of wrongdoing by a preponderance of the evidence.'" *Padilla*, 548 F.3d at 186-87 (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)). An officer must nonetheless have "a 'particularized and objective basis' for suspecting legal wrongdoing." *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

> While [an] officer may not rely on an inchoate and unparticularized suspicion or hunch, he is entitled to draw on [his or her] own experience and specialized training to make inferences from and deductions about the cumulative information available to [him or her] that might well elude an untrained person.

Padilla, 548 F.3d at 187 (internal quotation marks and citations omitted).

"Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a 'seizure' of 'persons' within the meaning of [the Fourth Amendment]." *United States v. Gomez*, 877 F.3d 76, 86 (2d Cir. 2017) (alteration in original) (quoting *Whren v. United States*, 517 U.S. 806, 809-10 (1996)). "Therefore, traffic stops must satisfy the Fourth Amendment's reasonableness limitation, which requires that an officer making a traffic stop have probable cause or reasonable suspicion that the person stopped has committed a traffic violation or is otherwise engaged in or about to be engaged in criminal activity." *Id.* (internal quotation marks omitted). "As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *United States v. Harrell*, 268 F.3d 141, 148 (2d Cir. 2001) (internal quotation marks omitted).

1. Whether a Reasonable Suspicion of a Traffic Violation Justified the Traffic Stop.

SA Frigon observed the red Durango traveling approximately ten miles per hour in excess of the posted speed limit. The court credits Defendant's statement that he does not believe he was speeding but because he admitted to SA Frigon that he was glancing down before the traffic stop, presumably at his phone, the court finds that his belief was mistaken.

In his affidavit, SA Frigon noted that the red Durango drove "across the solid, white highly visible line separating the travel lane from the emergency breakdown lane where a disabled vehicle was located." (Doc. 202-2 at 8.) Based on these observations, SA Frigon had a reasonable suspicion that Defendant had violated a New Hampshire motor vehicle law which provides:

> When the single center line highway marking method is used, no driver of a vehicle shall, while proceeding along a way, drive any part of such vehicle to the left of or across an unbroken painted line marked on the way by order of or with the approval of the said commissioner, except as herein otherwise provided and when the barrier line highway marking system is employed, no driver of a vehicle shall, while proceeding along a way, drive any part of such vehicle to the left of *or across an unbroken painted line* marked on the way in such driver's lane by order of or with the approval of said commissioner except: (a) [i]n an emergency; or (b) [t]o permit ingress or egress to side roads or property adjacent to the highway; or (c) [i]n case such driver has an unobstructed view and can see the end of the said unbroken painted line.

N.H. Rev. Stat. Ann. § 265:22 (emphasis supplied).

Defendant contends N.H. Rev. Stat. Ann. § 265:22 only applies if a vehicle drives to the left of its lane of travel. By its plain language, however, § 265:22 includes travel "across an unbroken painted line[.]" As a result, crossing over an unbroken painted line without doing so for the exceptions articulated in subsections (a)-(c) of the statute is a traffic violation. Moreover, even if Defendant's interpretation of the statute were correct, a traffic stop based on a mistake of law "can nonetheless give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment." *Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014).

> Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: The facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Id. at 536.

Under *Heien*, SA Frigon's reasonable belief that Defendant operated the red Durango in excess of the posted speed limit and across a painted unbroken line into the emergency breakdown lane provided him with an objective, reasonable suspicion to stop the red Durango. Defendant's argument that the traffic stop was pretextual does not alter that conclusion. A pretextual stop does not constitute a Fourth Amendment violation because "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis." *Whren*, 517 U.S. at 813. In other words, "[i]f an officer has observed a traffic violation, his actual motivation for stopping the vehicle is irrelevant to whether the stop is constitutionally reasonable." *United States v. Foreste*, 780 F.3d 518, 523 (2d Cir. 2015); *see also United States v. Cruz-Rivera*, 335 F. Supp. 3d 81, 88 (D. Mass. 2018) ("An officer may effectuate a vehicle stop if there is probable cause to believe that the driver has committed a traffic offense, even if the officer had an ulterior motive for the stop.").

Because SA Frigon had a reasonable suspicion that the operator of the red Durango committed motor vehicle violations, he was authorized to temporarily seize the vehicle and investigate further even if he had ulterior motives for the traffic stop.

2. Whether the Collective Knowledge Doctrine Authorized the Stop.

Although a closer question, the traffic stop was also authorized by "[t]he collective knowledge doctrine [which] provides that, for the purpose of determining [whether law enforcement action is lawful,] the knowledge of one [officer] is presumed shared by all." *Savino v. City of New York*, 331 F.3d 63, 74 (2d Cir. 2003) (alteration in original) (internal quotation marks omitted). The collective knowledge doctrine "exists because, in light of the complexity of modern police work, the arresting officer cannot always be aware of every aspect of an investigation; sometimes his authority to arrest a suspect is based on facts known only to his superiors or associates." *Id.* at 74 (quoting *United v. Valez*, 796 F.2d 24, 28 (2d Cir. 1986)). "Under Second Circuit precedent, application of this doctrine 'requires that at some point along the line, some law enforcement official—

or perhaps some agglomeration of such officials—involved must possess sufficient information to permit the conclusion that a search or arrest is justified.'" *United States v. Williams*, 627 F.3d 247, 253 (7th Cir. 2010) (quoting *United States v. Colon*, 250 F.3d 130, 136 (2d Cir. 2001)). The collective knowledge doctrine requires some communication between law enforcement officers to render reliance thereon reasonable. *See Wong v. Yoo*, 649 F. Supp. 2d 34, 60 n.11 (E.D.N.Y. 2009) ("While in some cases . . . facts supporting probable cause may be imputed from one officer to another, *some* amount of communication between officers is necessary in order for a second officer's reliance on the first officer's knowledge to be reasonable.") (internal quotation marks and citation omitted).

In this case, DEA agents were tracking the Target Phone pursuant to a cell phone warrant supported by probable cause. They determined that the Target Phone was traveling in the red Durango to the parking lot of a multi-unit apartment complex known to be the residence of Mr. Ross, a suspected drug trafficker. There was at least one phone call from the Target Phone to Mr. Ross. *See Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) ("[W]hile an individual's presence in an area of expected criminal activity, standing alone, is not enough to support [reasonable suspicion] . . . officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation."). The red Durango's brief stop in the vicinity of Mr. Ross's apartment was consistent with a pickup or drop off of illegal drugs or drug proceeds. *See Sokolow*, 490 U.S. at 9 ("While a trip from Honolulu to Miami, standing alone, is not a cause for any sort of suspicion, here there was more: surely few residents of Honolulu travel from that city for 20 hours to spend 48 hours in Miami during the month of July."); *see also United States v. Lyons*, 687 F.3d 754, 765 (6th Cir. 2012) ("The circumstances [including the vehicle's brief stop at a stash house and out-of-state license plates] were suspicious when considered through the prism of the DEA's prior knowledge."); *United States v. Jimenez*, 2000 WL 1752849, at *4 (S.D.N.Y. Nov. 29, 2000) (finding reasonable suspicion after "the officers observed [defendant] (a known drug courier) . . . enter 628 West 151st Street (a known drug

location), and re-emerge minutes later with an empty black bag. The officers then observed [defendant] . . . enter 736 Riverside Drive (another known drug location), and leave with a black bag[.]").

Under the collective knowledge doctrine, DEA agents were not required to communicate all the information they possessed to SA Frigon. Instead, it was sufficient that SA Frigon was advised to look for and stop a late model red Durango with Massachusetts license plates believed to be engaged in drug trafficking based upon electronic and mobile surveillance. SA Frigon was informed the DEA was investigating the vehicle's occupants as part of a Vermont-based drug investigation and that DEA agents had maintained visual surveillance of the red Durango while it was in Vermont earlier that day. He was also informed that one of the occupants of the vehicle was known to have multiple aliases. SA Frigon "clearly acted on the DEA's directive and executed the stop within the bounds of the DEA's reasonable suspicion. Accordingly, the collective knowledge doctrine applies, and the traffic stop was valid." *Lyons*, 687 F.3d at 769. The use of a motor vehicle violation to justify the stop is immaterial because "the collective knowledge doctrine is unaffected by an officer's use of a cover story to disguise a stop as a mere traffic stop." *Williams*, 627 F.3d at 253.

Because SA Frigon's traffic stop of the red Durango was supported by both a reasonable suspicion that Defendant had committed motor vehicle violations and the collective knowledge doctrine, the traffic stop did not violate the Fourth Amendment.

B. Whether to Suppress Evidence Obtained Pursuant to the Vehicle Search.

Defendant seeks suppression of all evidence obtained as a result of the New Hampshire state court search warrant, arguing that SA Frigon's affidavit failed to alert the issuing judge of the information SA Frigon received from the DEA. In his affidavit in support of the search warrant application, SA Frigon described the motor vehicle violations that gave rise to the traffic stop. He also described Ms. Osborne's nervous demeanor, his observation of the marijuana cigarette rolling papers in the glove compartment, and the odor of marijuana emanating from the vehicle. He recounted

Defendant's and Ms. Osborne's inconsistent stories regarding the path and purpose of their travel, the approximately $4,000 in cash recovered from Defendant's person, and the canine unit's alert to the presence of narcotics in the vehicle. These facts "provide[d] the magistrate [judge] with a substantial basis for determining the existence of probable cause[.]" *Illinois v. Gates*, 462 U.S. 213, 239 (1983). Against this backdrop, "[t]he fact that [SA Frigon] failed to note the DEA's involvement in [his] incident report is [] without consequence." *Lyons*, 687 F.3d at 769 n.6.

Because the New Hampshire state search court warrant was supported by probable cause, suppression of the evidence seized from the red Durango is not required.

CONCLUSION

For the reasons stated above, Defendant's motion to suppress is DENIED. (Doc. 202.)

SO ORDERED.

Dated at Burlington, in the District of Vermont, this 4th day of September, 2019.

Christina Reiss, District Judge
United States District Court